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# Rodney C. Rose v. Samuel S. Smith : Brief of Respondent

Utah Supreme Court

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DEC 9 1975

IN THE SUPREME COURT OF THE  
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

RODNEY C. ROSE,

Plaintiff-Appellant,

-vs-

SAMUEL W. SMITH, Warden,  
Utah State Prison,

Defendant-Respondent.

Case No.  
14013

BRIEF OF RESPONDENT

APPEAL FROM AN ORDER GRANTING RESPONDENT'S MOTION  
TO DISMISS, IN THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE  
HONORABLE JAMES S. SAWAYA, JUDGE, PRESIDING.

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FILED  
JUL 10 1975

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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RODNEY C. ROSE,

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-vs-

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IN THE SUPREME COURT OF THE  
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RODNEY C. ROSE,

Plaintiff-Appellant,

-vs-

SAMUEL W. SMITH, Warden,  
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Defendant-Respondent.

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Case No.  
14013

BRIEF OF RESPONDENT  
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STATEMENT OF THE NATURE OF THE CASE

The appellant, Rodney C. Rose, appeals from an order granting respondent's motion to dismiss entered in the Third Judicial District Court, Salt Lake County.

DISPOSITION IN THE LOWER COURT

Respondent's motion to dismiss the appellant's petition for writ of habeas corpus was granted by the judge after the hearing.

### RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the trial court's order dismissing appellant's petition for writ of habeas corpus.

### STATEMENT OF THE FACTS

The appellant, Rodney C. Rose, was judged and sentenced on a charge of sale of a stimulating drug on April 13, 1972. The appellant appealed to the Supreme Court of the State of Utah. The Court affirmed the conviction on April 26, 1973, State v. Rose (No. 12974 unpublished). The appellant then brought a habeas corpus action in the Second Judicial District Court. That writ was denied. The appellant then filed a petition for writ of habeas corpus in the United States District Court for the District of Utah. That petition was dismissed by Judge Willis W. Ritter. Appellant then filed a petition for writ of habeas corpus in the Third Judicial District, which the Court dismissed. The issues raised in the petition to the Third District Court were identical to the issues raised in appellant's petition previously filed in the Second District Court.

## ARGUMENT

### POINT I

THE LOWER COURT CORRECTLY DISMISSED THE PETITION FOR WRIT OF HABEAS CORPUS BECAUSE APPELLANT HAD PREVIOUSLY RAISED AND HAD AJUDICATED THE SAME OR SIMILAR ISSUES IN A PRIOR HABEAS CORPUS ACTION.

The habeas corpus rule under which the present action was filed in the court below is Rule 65B(i) (1953, as amended). The rule reads in part as follows:

"The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the state of Utah, he shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court

shall forthwith dismiss such complaint,  
giving written notice thereof by mail  
to the complainant, and no further  
proceedings shall be had on such  
complaint." (Emphasis added.)

As provided in Rule 65B(i), a habeas corpus action must be dismissed if the court determines that the "legality or constitutionality" of the complaint of incarceration has been previously adjudged. The rule not only supports the action of the lower court in the present case, but requires it.

Appellant presented basically three grounds for habeas corpus relief in the Third District Court: (a) insufficiency of the pleadings in that they did not contain the name of the party to whom a controlled substance was sold; (b) the crime for which he was convicted was classed as a felony, instead of a misdemeanor; and (c) his attorney's incompetence due to failure to perfect an appeal from the Second Judicial District decision denying habeas corpus. Each of these issues was raised in the previous habeas corpus petitions.

In the previous Second Judicial District decision on habeas corpus, the appellant alleged the following:



"(a) The petitioner was charged in an information filed in the Captioned Court alleging the 'sale' of a 'stimulant drug'--amphetamine.

(b) The indispensable question to whom the alleged 'sale' was made remains unanswered by the Record in the instant case.

\* \* \*

(1) By the attached controlling opinion of the majority of the Utah Supreme Court, it is apparent that the provision making the Sale of a Stimulant Drug . . . Punishable as a Misdemeanor--remained a part of the Laws of the State of Utah from 1967 to Jan. 1, 1972.

It follows therefrom that the conviction of the petitioner for a felony cannot stand."

Each of these contentions were rejected upon a hearing before the Honorable Calvin Gould, who in part held that since the petitioner did not request a Bill of Particulars, the information was considered sufficient and that the crime was found to be a felony, not a misdemeanor.

After this unsuccessful action, appellant filed a petition in the United States District Court for the District of Utah, Central Division, in which he raised the above contentions, and additionally alleged that his failure to perfect an appeal from the denial of habeas corpus relief by Judge Calvin

Gould was the result of ineffective assistance of counsel.

In dismissing the action for failure to exhaust state remedies, the federal court ruled that appellant's failure to exhaust state remedies was not a result of ineffective assistance of counsel. The Court stated:

"In the present matter it is obvious from the face of Rose's petition that he was aware of the availability of his right to appeal the state district court's opinion to the Utah Supreme Court. He failed to do so, and now blames his failure on one of the 'typical ravings' of the jailhouse lawyer who prepared his state court petition." Rose v. Smith, Civil No. C 74-76.

The Court ruled further that appellant had failed to make the required showing of incompetence, as set forth in Tollett v. Henderson, 411 U.S. 258 (1973).

Appellant had previously litigated the issues he raised in his habeas corpus action in the lower courts and his action was therefore properly dismissed. The dismissal required by Rule 65B(i) avoids the problems that occur when issues decided in one cause of action are the subject of a second cause of action. This view was expressed by this Court in Bryant v. Turner,

19 Utah 2d 284, 431 P.2d 121 (1967):

"Moreover, after judgment is entered, there is assured a right of appeal within the proper time to seek redress for any such error or transgression of those rights. When this procedure has been followed the judgment should normally be final. It should not be subjected to a continual merry-go-round of collateral attacks upon various and specious pretexts as some courts are prone to permit nowadays. In our opinion such an inconsiderate attitude toward final judgments regularly arrived at by courts of competent jurisdiction robs the law of the dignity and respect it is entitled to. It tends to degrade the whole process of law enforcement and the administration of justice and thus to undermine the good order of society it is purposed to maintain."

This view has also been expressed by the United States Supreme Court in cases which deal with the inappropriateness of repetitious habeas corpus petitions. Two United States Supreme Court cases, Fay v. Noia, 372 U.S. 391 (1963), and Murch v. Mottram, 409 U.S. 41 (1972), indicate that attempts by state prisoners to bring repetitious petitions are not to be approved

when an orderly procedure exists for petitioners to follow. Such an orderly procedure exists in Utah for the filing of a single habeas corpus petition. The piecemeal and/or repetitious filing of petitions is uncalled for in light of Rule 65B(i) of the Utah Rules of Civil Procedure.

Thus, it is clear that appellant's writ of habeas corpus was correctly dismissed because the same issues had been raised and adjudicated in a prior habeas corpus action.

#### POINT II

THE LOWER COURT CORRECTLY DISMISSED THE PETITION FOR WRIT OF HABEAS CORPUS BECAUSE APPELLANT RAISED OR SHOULD HAVE RAISED THE ISSUE OF SENTENCING IN HIS PREVIOUS APPEAL TO THIS COURT.

Appellant's substantive contention in this appeal appears very much like the contention on appeal from appellant's original conviction. On appeal from conviction of the crime appellant argued that the drug named in the information, and upon which he stood convicted, "methamphetamine," was at variance with the charge upon which he was bound over to the district court, and with the evidence as to the drug he sold,

which was "amphetamine." This Court stated, "We are unimpressed by this technical distinction and . . . affirm his conviction." State v. Rose, supra. In this appeal, appellant contends that the sentence for violation of the statute was a misdemeanor and not a felony based on passage of the new statute between the date of appellant's prosecution and the date of sentencing. Thus, the ultimate issue in both cases dealt with the proper sentencing of appellant. If the court finds that the issues in both appeals are substantially similar, then this appeal is merely a substitute for the appellant's previous appeal, and, under Utah law, cannot be granted. Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968); Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967); Burleigh v. Turner, 15 Utah 2d 118, 388 P.2d 412 (1968); Duran v. Turner, 30 Utah 2d 249, 516 P.2d 353 (1973); Zumbrunnen v. Turner, 27 Utah 2d 428, 498 P.2d 34 (1972). Nevertheless, if the issues are not substantially similar, then the question of proper sentencing under the new statute should have been raised in the first appeal, and by raising it now, appellant

has chosen the wrong time to challenge an issue which occurred months prior to his first appeal. Therefore, on either grounds, the petition was properly dismissed.

Appellant knew of his right to appeal his sentence since the transcript reflects that "petitioner declined to have his penalty altered after that hearing contending that this might disrupt his parole schedule, and, therefore, asked the court to take no further action in the matter of penalty alteration." (Tr.45). Respondent wonders, in a situation like the present case, at what time in the proceedings "these petitioners out at the prison are to be bound by what they say. . . ." (Tr.45). The trial judge also correctly analyzed appellant's position when he stated, "Assuming I deny his petition on the same issues (those raised in the Second District Court), are you saying that he has the right to go from one District to another filing one petition after another?" (Tr.42). The trial judge correctly responded in the negative by dismissing appellant's petition.

#### CONCLUSION

Because appellant's petition for writ of habeas corpus

raised issues that had previously been adjudicated in a habeas corpus proceeding and were either raised or should have been raised in a previous appeal from the conviction, the trial court properly granted respondent's motion to dismiss the petition.

Respectfully submitted,

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